

Mach (Migration) [2018] AATA 127 (22 January 2018)

DECISION RECORD

DIVISION:	Migration & Refugee Division
REVIEW APPLICANT:	Mr Arem Akuei Mach
VISA APPLICANTS:	Mrs Achol Deng Kuot Biar Ms Amour Arem Akuei Mach
CASE NUMBER:	1720988
DIBP REFERENCE(S):	BCC2015/4113070
MEMBER:	Peter Emmerton
DATE:	22 January 2018
PLACE OF DECISION:	Adelaide
DECISION:	The Tribunal remits the applications for Partner (Provisional) (Class UF) visas for reconsideration, with the direction that the first named visa applicant meets the following criteria for a Subclass 309 (Partner (Provisional)) visa: • cl.309.211 of Schedule 2 to the Regulations • cl.309.221 of Schedule 2 to the Regulations The Tribunal finds that the secondary applicant's application should be considered in the context of the delegate's decision regarding the primary applicants satisfying the remaining criteria for a subclass 309 visa decision.

Statement made on 22 January 2018 at 4:15pm

CATCHWORDS

Migration – Partner (Provisional) (Class UF) visa – Subclass 309 (Partner (Provisional)) – Genuine and continuing relationship – Financial support – Joint responsibility for care of children – Sponsor's injuries – Shared household work – Regular visits to wife in Kenya – Emotionally intertwined

LEGISLATION

Migration Act 1958, ss 5F, 65

Migration Regulations 1994, r 1.15A, Schedule 2, cls 309.211, 309.221

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration on 30 June 2017 to refuse to grant the visa applicants Partner (Provisional) (Class UF) visas under s.65 of the *Migration Act 1958* (the Act).
2. The first named visa applicant (the visa applicant), Mrs Achol Deng Kuot BIAR, applied for the visa on 30 December 2015 on the basis of their relationship with their sponsor, Mr Arem Akuei MACH, the review applicant. At that time, Class UF contained only one subclass: Subclass 309 (Partner (Provisional)). The criteria for the grant of this visa are set out in Part 309 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria. Relevantly to this matter the primary criteria include cl.309.211.
3. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.309.211 because they were not satisfied that the couple were in a genuine spousal relationship.
4. The review applicant appeared before the Tribunal on 19 January 2018 to give evidence and present arguments. The Tribunal also received oral evidence from the visa applicant via telephone.
5. The review applicant was represented in relation to the review by his registered migration agent.
6. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

7. The issue in the present case is whether the couple is in a genuine spousal relationship as defined by section 5F of the act.
8. In determining the applicants' claims the Tribunal must first make findings of fact on material matters in dispute. This may involve an assessment of credibility and in so doing, the Tribunal is aware of the need and importance of being sensitive to the circumstances and the difficulties applicants often face before the Tribunal in their particular circumstances.
9. The applicants rely on the evidence given before the Tribunal together with written submissions and supporting evidence provided to the Tribunal and previously to the Department. The Tribunal notes that substantially less evidence was presented to the Tribunal when they made their decision than was made available to the delegate, as the Department was unable to provide their file to the Tribunal. It should be noted that in spite of a number of communications with the department over a five week period, outlining the hearing schedule and requesting the file to be sent either in hard or soft copy, the Tribunal had no alternative but to make a decision with the evidence before it, as the Department was unable to furnish the file.

WHETHER THE PARTIES ARE IN A SPOUSE OR DE FACTO RELATIONSHIP

10. Clause 309.211(2) and 309.221 require that at the time the visa application was made, and at the time of this decision, the visa applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the visa applicant claims to be the spouse of the review applicant who is an Australian citizen.
11. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the visa applicant's and review applicant's household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision.

ARE THE PARTIES VALIDLY MARRIED?

12. If the parties are validly married, they may meet the requirements of a spousal relationship, but not a de facto relationship. The couple claim to have met on 7 September 1984 and married on 7 October 1984, in Bor, South Sudan. The delegate acknowledged that a marriage certificate had been produced from the Episcopal Church of South Sudan, although the date was illegible. They again note in their Decision Record that the couple were married. The Tribunal has no evidence before it to suggest that the delegate is incorrect in asserting the existence of the marriage. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

ARE THE OTHER REQUIREMENTS FOR A SPOUSAL RELATIONSHIP MET?

13. In forming an opinion whether they are in a spousal relationship consideration must be given to all of the circumstances of the relationship. This includes evidence of the financial and social aspects, the nature of the visa applicant's and review applicant's household and their commitment to each other as set out in r.1.15A which is attached to this decision.
14. The applicant lodged a valid application for a Class UF Partner (Provisional) and BC Partner (Migrant) visa on 3 July 2015 on the grounds of being in a spousal relationship with an Australian citizen.
15. The visa applicant is currently living in Kakuma refugee Camp, Kenya with her daughter Amour, the secondary applicant.
16. The couple met and married in 1984 and have seven children.
17. Upon the death of his brother in 1990 following his torture in prison during the war, the sponsor subsumed responsibility for his brother's wife and children. As is tradition in their Dinka culture, as well as providing for his inherited family, he fathered children with his brother's wife, in his brother's name, in order to continue his brother's name, whilst remaining married to his wife. His brother's wife is still considered married to her deceased husband and not married to the sponsor. They had six children together. This cultural norm known as levirate marriage, is verified by Francis Deng in his book "Customary Law in the Modern world", 16 October 2009.

18. The sponsor and his brother's wife and children came to Australia on 18 September 2007 on a subclass 202 visa.
19. The sponsor and his brother's wife ceased their intimate relationship in 2008, continuing to live in the same two adjoining houses until 2013. The sponsor moved to a private rental property at that time.
20. The sponsor successfully sponsored five of the children he fathered with the visa applicant and they arrived in Australia in February 2015.
21. In mid-2017 the sponsor and his five children moved back into the two adjoining houses with his brother's wife as a result of a housing issue with his landlord. The Housing Trust were unable to assist at that time due to long waiting lists, so they suggested the housing arrangement with the agreement of all parties. They are currently trying to locate a suitable house to again separate the brother's wife and children and the sponsor's wife and children.
22. At the time of the application the sponsor was in a mutually exclusive relationship with his wife and living separately to his brother's wife and children and continues to do so.
23. The sponsor has spent a total of forty three weeks living with his wife in the refugee camp in Kenya over the last nine years. Department records show six trips to stay with his wife between 2008 and 2016. The time spent visiting his wife totalling forty three weeks over the nine year period.
24. According to department records the visa applicant has not travelled to Australia.
25. The Tribunal has considered the documentary evidence provided to the Department and the Tribunal. The Tribunal, as previously stated, has had the benefit of taking oral evidence from the sponsor and two of her teenage children at the hearing, as well as oral evidence via telephone from the visa applicant and a witness Ms Madan. The Tribunal found all those presenting evidence to be credible and persuasive witnesses. Answers were provided in what appeared to be an honest and candid fashion without any apparent obfuscation or collusion. The Tribunal has considered all aspects of the relationship.
26. In relation to the financial aspects of the relationship between the applicant and the sponsor, the Tribunal has considered the following.
27. Any joint ownership of real estate or other major assets. The Tribunal has determined that the couple do not jointly own any major assets or real estate. The Tribunal finds this understandable in light of the long term geographic separation and modest government subsidised income received by the sponsor, which he in part uses to support the applicant and their two children residing in a Kenyan refugee camp. The sponsor and his family live in subsidised Housing Trust accommodation in Adelaide. The visa applicant and her two daughters live in two mud huts in the Kakuma refugee camp compound in Kenya.
28. The Tribunal received no evidence that the couple have any joint liabilities.
29. The extent of any pooling of financial resources, especially in relation to major financial commitments. Evidence was presented showing the transfer of approximately AUD\$150 – AUD\$200 per month from the sponsor to the visa applicant, commencing in March 2014. Corroborative evidence was presented to show that this money is being used to maintain the visa applicant and two dependent daughters in Kenya. Under questioning the sponsor stated that he would continue to support his one remaining daughter in Africa should the applicants in this application be successful in obtaining a visa. The amount being sent regularly

represents a substantial commitment on behalf of the sponsor in light of his Centrelink income and his large family.

30. Whether one person in the relationship owes any legal obligation in respect of the other. The Tribunal has determined that aside from the usual legal obligations associated with a marriage, the couple have not established any evidence to indicate additional legal obligations.
31. The basis of any sharing of day-to-day household expenses. Other than the commitment already stated there is no additional sharing of financial resources.
32. The Tribunal places moderate weight on the cumulative evidence in support of the financial aspects of the relationship in light of the meagre resources and the way they are being shared.
33. In relation to the nature of the household aspects of the relationship between the applicant and the sponsor, the Tribunal has considered the following.
34. Any joint responsibility for the care of children. The Tribunal has determined that five of the visa applicant's children live with the sponsor and they are also in part cared for by the sponsor's deceased brother's wife, whom they call "auntie", who lives in the adjoining duplex house. The principal parenting is undertaken by the sponsor for these five children, in spite of his substantial physical disabilities and the visa applicant regularly talks with them via telephone. This arrangement commenced from the time the children moved to Australia in 2015. The two children remaining in Kenya with their mother are principally parented by their mother.
35. The living arrangements of the visa applicant and the sponsor have been very difficult over a long period of time. They principally lived together in the refugee camp between 1994 and 2007 at which time the sponsor came to Australia as a dependent of his deceased brother's wife. Evidence was presented by the sponsor and tested by the Tribunal that his wife would from time to time be removed from him by her family and returned to their village as the sponsor didn't have the resources to complete the dowry payment. She would repeatedly escape the family and they would continue to live together as man and wife, this resulted in a large family. The dowry obligations were eventually paid and the visa applicant is considered the sponsor's legitimate wife.
36. In 2015 the sponsor successfully brought five of his seven children to Australia and they live with him. He left two of his children in the refugee camp, in part because of lack of funds. His wife who had been unsuccessful in her application stayed with them. This application does not include the eldest daughter Nyalueth Arem, born 11 July 1987, although evidence was presented stating both daughters are dependent upon him.
37. In spite of the financial hardship the sponsor has travelled regularly to Kenya to stay with his wife. He has spent a total of forty three weeks living with her, as her spouse, in the last nine years. This evidence was substantiated by verbal and written statements to the Tribunal .
38. Any sharing of responsibility for housework. When the couple are living together he undertakes tasks within his limited physical capacity, whilst the visa applicant takes responsibility for running the meagre household.
39. The Tribunal places moderate weight on the cumulative evidence presented in relation to the nature of the household.

40. In relation to the social aspects of the relationship between the visa applicant and the sponsor the Tribunal has considered the following.
41. Whether the persons represent themselves to other people as being married to each other. The couple's two teenage children, who gave evidence before the Tribunal, clearly demonstrated their belief that their mother and father were married and looking to be reunited. The sponsor's brother's wife demonstrated likewise. The Centrelink statement regarding the sponsor's entitlements clearly states that he is single for their purposes. They therefore demonstrate that they do not believe that he is in a relationship with his brother's wife. A statement from the children's school principal also demonstrates his belief that the couple are married. Statutory declarations from two of their children also attest to the belief that their parents are in a marriage.
42. The opinion of the persons' friends and acquaintances about the nature of the relationship. In addition to the school principal's statement already mentioned, a statutory declaration by a family friend and distant relative, likewise refers to their marital status in conjunction with the sponsor's responsibilities to his deceased brother's wife.
43. The opinion of the persons' friends and acquaintances about the nature of the relationship.
44. Any basis on which the persons plan and undertake joint social activities. No evidence was presented to support joint social activity. The couple have lived a subsistence life in a refugee camp for a very substantial period of time prior to the sponsor entering Australia. Whenever he re-joins his wife it is under the same conditions. The Tribunal would not expect joint social activities to be a priority.
45. The Tribunal places substantial weight upon the cumulative evidence provided in support of the social aspects of their relationship.
46. In relation to the nature of the persons' commitment to each other, the Tribunal has considered the following.
47. The duration of the relationship. The couple have been married from 1984 until the current day, a total of thirty four years. Whilst there have been periods apart because of war, severe injury, dowry issues and the sponsor's immigration to Australia, they have always come back together as a spousal couple,
48. The length of time they have lived together. The couple have lived the larger part of their married life in a refugee camp. As previously stated this was interrupted for periods of time however the base line, as corroborated by a range of presented evidence, is living together as man and wife, under whatever circumstances they have had to endure. The Tribunal notes that the sponsor has substantial injuries, resulting in severe multiple disabilities. In spite of this he regularly visits his wife under very rudimentary living and sleeping conditions. The Tribunal observes that this is most likely at great cost to his physical comfort and wellbeing.
49. The degree of companionship and emotional support that the persons draw from each other. The Tribunal was convinced by the testimony of the couple, which was supported by witness testimony that the relationship is mutually emotionally nourishing. It appeared to the Tribunal that the sponsor was very emotionally intertwined with his wife and was greatly saddened by their being apart.
50. The community requirement to take responsibility for your deceased brothers' wife and continue his family, in his name, whilst at the same time grow your own family is substantially at variance to Australian legal and cultural norms. The Tribunal tested the assertion, in the

affirmative, that upon settling in Australia the sponsor and his brother's wife ceased the previous relationship. A supportive plutonic relationship appears to endure with the "aunty" role being fulfilled with assistance and support provided by her to the sponsor's family members as well as her own.

51. The Tribunal determines that the various pieces of evidence provided to demonstrate ongoing communication between the visa applicant and the sponsor and her family, coupled with the evidence provided by the witnesses as to the very regular nature of the communications, further strengthen the body of evidence supporting the genuineness of this relationship.
52. The Tribunal places substantial weight upon the cumulative evidence provided in support of the couple's commitment to each other.
53. For the above reasons, the Tribunal is satisfied that at the time of application and at the time of decision, the visa applicant and the review applicant were in a genuine and continuing relationship, and had a mutual commitment to a shared life to the exclusion of all others, and lived together, or not separately and apart, on a permanent basis.
54. On the basis of the above the Tribunal is satisfied that the requirements of s.5F(2) are met at the time the visa application was made and the time of this decision.
55. Therefore the visa applicant meets cl.309.211 and cl.309.221.
56. As the delegate found that the primary applicant did not meet the legislative requirements specified in cl.309.211(2), the secondary applicant was unable to satisfy cl.309.321(a).
57. The Tribunal therefore finds that the secondary applicants' application should be considered in the context of the delegate's decision regarding the primary applicants satisfying the remaining criteria for a subclass 309 visa decision.
58. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 309 visa.

DECISION

59. The Tribunal remits the applications for Partner (Provisional) (Class UF) visas for reconsideration, with the direction that the first named visa applicant meets the following criteria for a Subclass 309 (Partner (Provisional)) visa:
 - cl.309.211 of Schedule 2 to the Regulations
 - cl.309.221 of Schedule 2 to the Regulations
 - The Tribunal finds that the secondary applicant's application should be considered in the context of the delegate's decision regarding the primary applicants satisfying the remaining criteria for a subclass 309 visa decision.

Peter Emmerton
Member

60.

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day-to-day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long-term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).